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COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

THE PEOPLE,

Plaintiff and Respondent,

v.

WYNONA ANN MITCHELL,

Defendant and Appellant.

D054492

(Super. Ct. No. SCD214409)

APPEAL from a judgment of the Superior Court of San Diego County, William H. Kronberger, Jr., Judge. Affirmed.

A jury convicted Wynona Ann Mitchell of first degree burglary with a non-accomplice present in the residence (Pen. Code,¹ §§ 459/667.5, subd. (c)(21)) and of receiving stolen property (§ 496, subd. (a)). Mitchell subsequently admitted the truth of five probation denial priors (§ 1203, subd. (e)(4)) and two prison priors (§ 667.5, subd. (b)). The trial court sentenced Mitchell to a total prison term of six years.

¹ All statutory references are to the Penal Code unless otherwise specified.

Mitchell appeals, contending the trial court prejudicially erred in failing to instruct the jury that evidence of her out-of-court oral statements must be viewed with caution. We affirm.

FACTUAL BACKGROUND

Around 10 or 11 p.m. on the evening of June 21, 2008, Mitchell and Lenoris Jones entered the Blarney Stone Pub (the Pub) located on Island Avenue in downtown San Diego where Jones asked Eliliue Nakamura to open room 214 of the Callan Hotel (the Callan) for him, which could only be accessed via a security gate into the hotel. Nakamura, the part owner, manager of the Pub as well as the Callan, a residential hotel located on the two floors above the Pub, was aware that Jones knew the occupant of room 214, Margaret Armstrong, and that he sometimes brought women into Armstrong's room when she was absent. Despite this knowledge, Nakamura refused to open the room for Jones as he was not a resident of the hotel.

Later, at around midnight, San Diego Police Officer Mark Amancio, patrolling on foot in the Gaslamp area, came across Jones yelling outside the Callan as Mitchell sat nearby. Jones told the officer he lived in the hotel with his girlfriend who was in the hospital and he wanted to get into their room. Jones said he had thrown his keys at a window to get someone's attention, but they had landed on a ledge, so he was yelling to get the attention of anyone inside the hotel. After hearing this explanation, Amancio left the area.

Shortly thereafter, Jones and Mitchell returned to the Pub where Jones again asked Nakamura to open room 214 or to let him into the hotel so he could retrieve his keys. Nakamura again declined to do so.

Not long after that, 54-year-old William Noonan, who lived in room 219 of the Callan, heard loud voices in the hallway outside his room and then a knock on his door. Opening the door about a foot, Noonan saw Jones, who he recognized as someone who occasionally stayed with Armstrong in room 214, and Mitchell, who was carrying a large purse. When Jones told Noonan the story about his keys landing on a ledge, Noonan responded that he had not heard anything but would check his window ledge. As Noonan turned to go to the window, Jones rushed past him into the room. Noonan grabbed Jones from behind, told him to get out of the room and shoved him toward the door. As he did so, Noonan noticed that Mitchell had entered his room and was standing by his desk, where he kept his cell phone, bus pass and other personal belongings. At Noonan's insistence, Mitchell and Jones left the room.

Upset with the encounter, Noonan decided to call the police but discovered his cell phone was missing. Noonan then went downstairs to the Pub, told Nakamura what had happened and borrowed her cell phone to call the police. Noonan, who had gone outside to make the call, turned to see Amancio and another police officer approaching the hotel on foot. The officers came to the area to assist other officers who were responding to Noonan's call. After telling Amancio what had occurred, Noonan walked with him to the hotel's entrance where they saw Mitchell and Jones talking with the dispatched officers.

Because Noonan had already talked with Amancio about the incident, he sat down on the steps and waited while Amancio joined the other officers.

Those officers, Susan De La Pena and Francis Cali of the San Diego Police Department's Gaslamp Bicycle Team, had arrived at the Callan a short time before to find Mitchell and Jones sitting outside on the hotel steps. When De La Pena asked Mitchell where she lived, she said room 214 and got up and started walking away. When De La Pena then told her to wait and "hold on a second," Mitchell ignored her and started moving her body and waving her hands around as the officer repeated her request for Mitchell to stop. Because Mitchell repeatedly refused to stay still or comply with De La Pena's directions, the officers separated her from Jones and handcuffed her for officer safety purposes.

While Amancio talked with Jones, because Mitchell still refused to stand still, Cali removed her handcuffs, took her jacket and large purse that was open from her, and rehandcuffed her. In response to Mitchell's denial of having any identification with her, Cali emptied the purse's contents onto the jacket on the ground and found Mitchell's identification.

At this point, Cali asked Noonan, who was still sitting nearby, if he had made the call to police. After Noonan acknowledged he did, told Cali what had happened and identified Mitchell and Jones as the people who had entered his room without permission, Cali let Noonan leave and go back to the Pub. When Cali turned to assist another officer with Mitchell, he glanced at the ground near Mitchell's purse and saw a bus pass with Noonan's name and photograph on it. After Cali walked back to the Pub and verified the

bus pass belonged to Noonan, he had Noonan come back to the area where the purse was on the ground in front of the Callan to see if he recognized any other items. When they got there, Noonan immediately pointed to his cell phone, cell phone cover and a pack of cigarettes as his belongings among the numerous items in Mitchell's purse. Cali returned the items to Noonan and took a more complete statement from him.

In addition to the above evidence being admitted in the prosecution case at trial, Amancio also testified that Noonan was not under the influence of drugs during their sidewalk interview.

Defense

Mitchell testified in her own defense. On the night in question, she had met up with Jones, whom she considered a good friend, in the Petco Park stadium area and decided to return to Jones's room with him to get high. After they walked to the Callan, Jones, who did not have a key for the security gate, went to the Pub to ask the owner to let them into the hotel. After the owner would not do so, Mitchell went with Jones outside the hotel where he tossed his keys up at the windows to see if somebody would let them in. Unfortunately the keys did not come down so they needed to go up to look for them. When Jones again asked the owner to let them in, she again refused. Someone finally opened the hotel security door to let them enter in response to Jones's screaming and the two started knocking on doors to find Jones's keys when Noonan opened his.

Mitchell claimed Noonan invited Jones, whom he knew, inside his room so he could look for the keys. When Jones did not find the keys, he whispered something to Noonan and told Mitchell to come inside and wait while he knocked on other doors.

Once Jones left, Noonan asked her if she wanted to get high and if she had a pipe. When she replied affirmatively to both questions, they then smoked some cocaine Noonan had hidden in his room. According to Mitchell, Noonan began "tweeking," "spasming out" and twitching in response to the drugs. He then asked her if Jones had any more drugs and started handing her his bus pass, cell phone and other items, which she thought was payment for the drugs. After taking several more "hits," Noonan then shut off the lights and pulled down his shorts. Mitchell said she was not going for any of that and left, going downstairs where she sat on the steps outside to wait for Jones. After Jones joined her and she started to tell him what had happened in Noonan's room, the police showed up. Mitchell, however, did not tell the police about Noonan's actions at that time.

Mitchell denied she told the police she lived in room 214 at the hotel, saying she told them she was with Jones in room 214 that night. She also denied she had gone to the Callan with Jones to exchange sex for drugs. Mitchell additionally denied stealing the items from Noonan's room, saying she intended to give them to Jones to return to Noonan and claimed Noonan was lying about the incident. When Mitchell was questioned about her past felony convictions, she initially denied having been convicted of possessing cocaine for sale, but then admitted the conviction when she was confronted with its underlying facts.

DISCUSSION

During jury instruction discussions, Mitchell's counsel objected to the prosecutor's request that CALCRIM No. 362 (false statements as evidencing consciousness of guilt) be given because two officers had testified that Mitchell said she lived in room 214 at the

Callan, which was established as false by the testimony of other witnesses. After noting that there was clearly evidence that Mitchell had made the statement and that the statement was false, the court ruled it would give the instruction because the jury should determine the issue based on the conflicting evidence that Mitchell claimed she never made that statement.

Subsequently, the court instructed the jury with CALCRIM No. 362 as follows:

"If the defendant made a false or misleading statement relating to the charged crime, knowing the statement was false or intending to mislead, that conduct may show she was aware of her guilt of the crime and you may consider it in determining her guilt. [¶] If you conclude that the defendant made the statement, it is up to you to decide its meaning and importance. However, evidence that the defendant made such a statement cannot prove guilt by itself."

The court also instructed the jury, without objection, under CALCRIM No. 358 (defendant's out-of-court statements), which told the jury that:

"You have heard evidence that the defendant made an oral or written statement before the trial. You must decide whether or not the defendant made any such statement in whole or in part. If you decide that the defendant made such a statement, consider the statement along with the other evidence -- all the other evidence, in reaching your verdict. It is up to you to decide how much importance to give to such statement."

During closing arguments, the prosecutor pointed out the inconsistencies between Mitchell's and the two officers' testimony about whether Mitchell had told the officers she lived in room 214, telling the jurors that if they believed Mitchell had made the statement to the police, it could use it when they considered her credibility. The prosecutor also referred the jurors to CALCRIM No. 362 to determine the statement's meaning and importance should they determine that she made it and to decide whether such showed

Mitchell was aware of her guilt of the crime. The prosecutor stressed, however, that the jury could not use the fact Mitchell had made the statement to prove her guilt by itself.

On appeal, Mitchell contends the trial court prejudicially erred by failing to sua sponte instruct with the bracketed portion of CALCRIM No. 358 that tells the jury to view her out-of-court statements with caution. Specifically, Mitchell argues that because the prosecutor in closing placed great weight on her statement that she lived in room 214 at the Callan as evidencing consciousness of guilt and as a false statement going to her credibility, the omission of the cautionary language from CALCRIM No. 358 resulted in a denial of her constitutional rights to due process and a fair trial. Mitchell therefore claims her convictions must be reversed for prejudicial instructional error.

The People essentially concede the court erred when it omitted the bracketed portion of CALCRIM No. 358, which states: "Consider with caution any statement made by (the/a) defendant tending to show (his/her) guilt unless the statement was written or otherwise recorded," but asserts the error is harmless. We agree.²

Although the bracketed language was mainly required with regard to actual incriminating statements made by a defendant that were offered at trial (*People v. Beagle* (1972) 6 Cal.3d 441, 455-456 (*Beagle*)), our Supreme Court in *People v. Carpenter* (1997) 15 Cal.4th 312 determined the rationale of such cautionary instruction required it be given for "any oral statement of the defendant, whether made before, during, or after

² Although Mitchell did not object below to the court's failure to instruct with the cautionary language in CALCRIM No. 358, its omission to do so is reviewable on appeal to the extent it may affect her substantial rights. (§ 1259.)

the crime." (*Id.* at p. 393.) "The purpose of the cautionary instruction is to assist the jury in determining if the statement was in fact made." (*Beagle, supra*, 6 Cal.3d at p. 456.) However, the failure to give such instruction "does not constitute reversible error if upon a reweighing of the evidence it does not appear reasonably probable that a result more favorable to defendant would have been reached in the absence of the error." (*Id.* at pp. 455-456.)

In this regard, "[s]ince the cautionary instruction is intended to help the jury to determine whether the statement attributed to the defendant was in fact made, courts examining the prejudice in failing to give the instruction examine the record to see if there was any conflict in the evidence about the exact words used, their meaning, or whether the [statements] were repeated accurately." (*People v. Pensinger* (1991) 52 Cal.3d 1210, 1268.) Where there was no such conflicting evidence and the defendant simply denies making the statement, our Supreme Court has generally found the failure to give the cautionary instruction harmless. (*People v. Dickey* (2005) 35 Cal.4th 884, 905-906 (*Dickey*); *People v. Bunyard* (1988) 45 Cal.3d 1189, 1224-1225.)

Here, Mitchell merely denied making the statement that she lived in room 214 at the Callan and did not dispute the accuracy or meaning of those words attributed to her by the two responding officers. Although Mitchell then testified that she told the officers she had been with Jones in room 214 that night, such does not show a conflict in the evidence concerning the precise words she was overheard using to answer the officer's question of where she lived. (See *Dickey, supra*, 35 Cal.4th at pp. 905-906.) Moreover, in addition, to the correct, but incomplete CALCRIM No. 358 given in this case, the trial

court gave other instructions regarding the evaluation of the credibility of witnesses and conflicts in testimony (i.e., CALCRIM Nos. 226, 302) to assist the jury in determining whether the officers' testimony regarding Mitchell's purported out-of-court statement was credible, thereby minimizing the possibility that the jurors did not view the statement with caution.

Further, as the People point out, the complained of statement about what Mitchell said as to where she lived, "was but a minor offering on the overall issue of [her] general lack of credibility." Not only was Mitchell's veracity called into question by her initial denial of having a prior felony drug conviction until she was confronted with its details, her credibility was also negated by her admission she hides her drug and street activities from her husband, by her long descriptive story of how she and Noonan got high that night with Noonan "tweeking" out, giving her all his property and pulling down his shorts before she fled his room, which conflicted with Noonan's version of the encounter, and Amancio's testimony that Noonan did not exhibit any evidence of being under the influence of drugs when contacted that night. More importantly, Mitchell's own testimony showed the falsity of her claim that she had been with Jones in room 214 that night. The entire gist of her testimony was that she and Jones were trying to get into room 214 of the Callan that night so they could do drugs. Nakamura's and Amancio's testimony confirmed that Mitchell was with Jones who was trying to get into room 214 and that someone other than Mitchell lived in that room. At no point did Mitchell testify that she had actually gone inside room 214, only that she had gone into Noonan's room and had then immediately left the hotel.

In light of the strong prosecution case, the general lack of credibility on Mitchell's part as to what occurred that night, and the other properly given instructions regarding the credibility of witnesses, we conclude it is not reasonably probable Mitchell would have received a more favorable result had the trial court given the cautionary instruction of CALCRIM No. 358.³ (*Beagle, supra*, 6 Cal.3d at p. 456.) No prejudicial instructional error is shown.

DISPOSITION

The judgment is affirmed.

HUFFMAN, J.

WE CONCUR:

McCONNELL, P. J.

O'ROURKE, J.

³ Mitchell's attempt to show that the court's error in omitting the bracketed portion of CALCRIM No. 358 somehow affected the giving of CALCRIM No. 362, which was a proper and correct instruction, also fails.